



Province of the  
**EASTERN CAPE**  
COOPERATIVE GOVERNANCE  
& TRADITIONAL AFFAIRS

**Legal Advisory Services**

Tyamzashe Building | Civic Square | Bisho | 5605

P/Bag X0035 | Civic Square | Bisho | 5605

Tel: +27 (0)40 609 5592 / 5382 | Fax: +27 (0)40 609 5368

CCMA

# GOVERNANCE PROTOCOL FOR SOURCING OF LEGAL OPINIONS

SERVING OUR COMMUNITIES BETTER

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BACK TO BASICS  
SERVING OUR COMMUNITIES BETTER

<b>Departmental Contact Details</b>	
<b>Physical Address</b>	<b>Tyamzashe Building Phalo Avenue Bhisho 5605</b>
<b>Postal Address</b>	<b>Department of Cooperative Governance and Traditional Affairs Private Bag X0035 Bhisho 5605</b>
<b>Document Number</b>	<b>1</b>
<b>Document Name</b>	<b>Governance protocol for sourcing of legal opinions</b>
<b>Contact Person</b>	<b>Mr Siphwo Maqungo</b>
<b>Designation</b>	<b>Director</b>
<b>Component</b>	<b>Legal Advisory Services</b>
<b>Telephone No.</b>	<b>040 609 5429</b>
<b>Cell Phone No.</b>	<b>082 956 2820</b>
<b>Fax No.</b>	<b>040 609 5368</b>
<b>E-mail Address</b>	<b><a href="mailto:siphwo.maqungo@eccogta.gov.za">siphwo.maqungo@eccogta.gov.za</a></b>
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**SIGN OFF**


**I. Head of Department**

This protocol has been recommended by Gabisile Gumbi-Masilela in my capacity as the Head of Department of Cooperative Governance and Traditional Affairs.

I am satisfied and concur with the contents of this protocol.

Signed:	
Designation:	Head of Department
Date:	2/4/19

**II. Executive Authority**

Signed:	
Designation:	MEC: Fikile Xasa of Cooperative Governance and Traditional Affairs
Date:	05/04/2019

## 1. PREAMBLE

One of the founding values of the Constitution of the Republic of South Africa is the Supremacy of the Constitution and the rule of law. The rule of law imposes a serious obligation to an organ of State in relation to decision making and action because an organ of State can only perform those functions that are authorized to it by law. This is also a requirement in terms of Promotion of Administrative Justice Act (PAJA) in relation to administrative action.

Failure to take decisions also has serious legal consequences in terms of PAJA and the Constitution. An organ of State may be compelled to take a decision by judiciary if it fails to do so. Section 237 of the Constitution further requires that all constitutional obligations must be performed diligently and without delay.

Our law also embraces a doctrine of "*functus officio*" which requires finality of administrative decisions. In terms of this principle once an administrator has taken a final decision he / she will not be entitled to revoke the decision in the absence of statutory authority to do so and that administrative decisions may only be set aside in proceedings properly brought for judicial review. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.

Poor decision making may therefore not only lead to litigation against the department, but in appropriate circumstances, the department may be required to initiate judicial review proceedings to rectify its own wrongful decision. The obligation to rectify a wrongful decision is founded on the principles of accountability and transparency that are provided in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a) of the Constitution. The Constitutional Court in ***Khumalo and Another v MEC for Education KZN (2013) ZACC 49*** held that when *a functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if needs be, to correct any unlawfulness through the appropriate avenues.*

Constitutional democracy like ours therefore requires utmost vigilance when it comes to decision making by an organ of State.

These are some of the reasons why decision makers would solicit a legal opinion or at the very least, legal comments or inputs before taking decisions.

This protocol therefore is intended to regulate how legal opinions must be solicited from Legal Advisory Services to mitigate the risk of indecision, delayed decisions, wrongful and/or unlawful decisions.

## 2. PURPOSE

The purpose is to ensure that decisions and actions to be taken by the department are in line with legislation and are as authorised by law, and to ensure uniformity in the understanding and interpretation of law in the Department.

## 3. DEFINITIONS

Terms and definitions that will be used throughout the protocol that need clarification for the reader, this can also include any keywords, technical terms and abbreviations that may be used in this document. Definitions in this Protocol, unless the context otherwise indicates.

<b>Words/Terms</b>	<b>Definition (with examples if required)</b>
Accounting Officer	Means an accounting officer as defined in the Public Finance Management Act, 1999 (Act No.1 of 1999)
Decision Maker	Means the Member of the Executive Authority or the Head of Department or any official who is delegated and authorised to take decisions in his or her area of responsibility.
Executive Authority	Means the member of the Executive Council responsible for the department of Cooperative Governance and Traditional Affairs
External Legal Practitioner	Means a practising attorney or advocate
State Attorney	Means any person who is an Attorney in the office of the State Attorney created in

	terms of State Attorney Act, 1957 (Act No.56 of 1957)
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#### **4. APPLICATION AND SCOPE**

This protocol is applicable to all officials of the departments who solicits or have solicited legal advice, comments or input from Legal Advisory Services.

#### **5. LEGISLATIVE FRAMEWORK**

All legislation applicable to the department, including but not limited to the following:

- Constitution of the Republic of South Africa of 1996
- Public Service Act, 1994 (Proclamation 101 of 1994) as amended
- Labour Relations Act, 1995 (Act No.66 of 1995) as amended
- Public Service Regulations, 2016
- Basic Conditions of Employment Act (Act 75 of 1997) as amended by Act 20 of 2013
- Employment Equity Act (Act 55 1998) as amended by Act 47 of 2013
- Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000)
- Promotion of Access to the Information Act, 2000(Act No 2 of 2000)
- Promotion of Equity and Prevention of Unfair Discrimination Act (Act No 4 of 2000)
- Protected Disclosures Act, 2000 (Act No.26 of 2000)
- Protection of Personal Information Act, 2013 (Act 4 of 2013)
- Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004)
- Disaster Management Act, 2002 (Act No. 57 of 2002)
- Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013)
- Interpretation Act, 1957 (Act No.3 of 1957)
- Skills Development Act, 1998 (Act No. 97 of 1998)
- Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and regulations
- Public Finance Management Act (Act 1 of 1999 as amended) and Treasury regulations
- Intergovernmental Relations Framework Act, 2005
- State Liability Act, 1957 (Act 20 of 1957) as amended
- State Attorneys Act, 1957 (Act 56 of 1957) as amended
- Eastern Cape Traditional Leadership and Governance Act., 2017 (Act No.1 of 2017)
- Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003)
- Eastern Cape Traditional Leadership and Governance Act, 2004 (Act 4 of 2005)

- Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)
- Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)
- Local Government: Municipal Finance Management Act 2003 (Act No.56 of 2003)

## **6. GUIDING PRINCIPLES**

### **6.1 Professionalism**

Legal Advisory Services staff of the department that generates legal opinions is expected to maintain a high standard of professional ethics. Conflict of interests must be avoided and the doctrine of professional legal privilege must be adhered to. The staff must, both during or after term of employment in the department treat as confidential the personal information which comes to their knowledge in the course of performance of their official duties, except if the communication of such information is required by law or in the proper performance of their duties.

### **6.2 Respect for the rule of law**

The department acknowledges that as an organ of State it must obey the law and that its functionaries cannot exercise power unless authorized by law.

### **6.3 Diligence**

Constitutional obligations must be performed diligently and without delay. Decision makers must timeously request legal advice when a need arises because delayed request may render the advices insignificant due to factors like prescription.

## **7. THE NATURE AND STATUS OF LEGAL OPINIONS AND ADVICES**

### **7.1. Legal Professional Privilege**

As a general rule, communications between a legal advisor and his or her client are protected from disclosure. Consequently, privileged materials like opinions may not be admitted as evidence in a Court of law without the consent of the client. The client may also not be required to testify in any tribunal about the content of the privileged material.



In order for a legal opinion or advice to attract legal professional privilege the following requirements must be met:

- (a) The legal opinion or advice must be given by the legal advisor acting in his or her professional capacity. In South Africa, advices given by a salaries-in house legal advisors are also classified as privileged provided the legal advisor is an attorney or advocate (though not necessarily practising as such) and that he or she was acting in the capacity of a legal advisor<sup>1</sup>.
- (b) The communication must have been made in confidence. A mere friendly communication is not covered.
- (c) The client must have communicated to the legal advisor for purposes of obtaining legal advice.
- (d) Legal professional privilege must and can only be claimed by client.

7.2 It is worth to note that legal professional privilege does NOT apply if an advice is sought for purposes of committing crime or misconduct.

7.3 A legal opinion is not a directive, a decision maker is still required to consider the opinion and may in appropriate circumstances not accept it or request a second opinion from the State Attorney.

## **8. REFERRAL OF DOCUMENTS SOLICITING LEGAL OPINIONS OR LEGAL COMMENTS**

8.1 All documents that are sent for legal advice or comment must be done through a memorandum setting out the advice that is solicited and all relevant documents

8.2 It is must be noted that legal advices and comments are intended to assist decision makers and are limited only to the mandate of the department. Only decision makers may solicit a legal opinion from Legal Advisory Services. A member of Senior Management Service who is not delegated to take a decision, may not solicit an opinion for purposes of making a recommendation to a decision maker, unless she or he has agreed with the decision maker that an opinion must be solicited.

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<sup>1</sup> See Van der Heever v Die Meester 1997(3) SA 102 (T)

- 8.3 Referrals to Legal Advisory Services must be responded to within three working days from the date of their receipt or any other shorter time as the case may be.
- 8.4 In appropriate circumstances, a consultation may be required to get proper instructions from the client.
- 8.5 No opinion must be given orally unless in truly exceptional and compelling circumstances and only be given to the MEC or Head of Department and should that happen, it must be confirmed in writing.

## **9. UNAUTHORISED DISCLOSURE OF LEGAL OPINIONS**

- 9.1 All legal opinions are classified as confidential and attract professional legal privilege and thus may not be unlawfully disclosed to anyone. Unauthorized disclosure constitutes breach of information security of the department.
- 9.2 Legal Advisory Services may, with the approval of the Head of Department, suspend providing a legal opinion directly to a person who is found to have unlawfully disclosed a legal opinion until the breach has been remedied. It must be said in such circumstances; advices can only be done to the affected directorate when requested by the Head of Department.

## **10. SOLICITING OPINIONS FROM PRIVATE LEGAL PRACTITIONERS**

- 10.1 The duty to generate legal opinions or advices is the primary responsibility of the department's Legal Advisory Services.
- 10.2 The department must strive to ensure that less or no fees are paid to external legal practitioners for sourcing of legal opinions except on aspects that need specialized legal skill.
- 10.3 It is therefore imperative for the department to adequately capacitate legal advisory services personnel to deal with complex matters to ensure quality legal advisory service.
- 10.4 A decision to solicit external legal advice can only be done by the Head of Department or the MEC and through the Office of State Attorney after having considered the following:

- Capacity within Legal Advisory Services;
- Timelines and level of urgency;
- Expertise and experience required;
- Policy requirement;
- Security considerations;
- Costs implications
- Unique considerations associated with the service and
- If Legal Advisory Services recommends so due to ethical considerations like conflict of interest.

## **11. REQUEST FOR LEGAL OPINIONS BY EXTERNAL STAKEHOLDERS OF THE DEPARTMENT**

- 11.1 The mandate of the department is to support and strengthen the capacity of municipalities and traditional leadership institutions. In principle therefore this mandate is not extended to provision of legal opinions by the department's Legal Advisory Services directly to municipalities and traditional leadership institutions.
- 11.2 It is however acknowledged that in exceptional circumstances municipalities and traditional leadership institutions may solicit legal advice from the department as part of the department structured support plan to a particular municipality or traditional leadership institution.
- 11.3 It must however be stated that, notwithstanding provisions of 11.2; under no circumstances may a legal opinion be solicited from external private practitioners on behalf of the department's external stakeholders.
- 11.4 A request to Legal Advisory Services to generate a legal opinion on behalf of the department's external stakeholder must only be made by the MEC or Head of Department and will only be addressed to them. Under no circumstances must an external stakeholder directly request a legal opinion from Legal Advisory Services.
- 11.5 The provisions of clause 11.4 do not apply to officials of the department who have been seconded to municipalities as Municipal Managers or Administrators.

## **12 MONITORING OF COMPLIANCE WITH THE PROTOCOL**

Legal Advisory Services will monitor the extent of compliance with this protocol

## **13 COMMUNICATION**

The protocol will be communicated by means of intranet, circulars and advocacy sessions to all employees of the Department.

## **14 IMPLEMENTATION**

This protocol will come into effect immediately on approval by the Executive Authority

## **15 REVIEW OF THE PROTOCOL**

This protocol will be reviewed bi annually from the date of approval and when there are compelling developments in the legal framework regulating provision of legal advices.